3-21-1892

In the Senate of the United States. Letter from the Secretary of the Interior, in response to Senate resolution of March 16, 1892, relative to the title by which the Cherokee Nation hold the Cherokee Outlet

IN THE SENATE OF THE UNITED STATES.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

IN RESPONSE TO

Senate resolution of March 16, 1892, relative to the title by which the Cherokee Nation hold the Cherokee Outlet.

MARCH 21, 1892.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, March 17, 1892.

SIR: I have the honor to acknowledge the receipt of Senate resolution of the 16th instant in the following words:

Resolved, That the Secretary of the Interior be directed to transmit to the Senate a copy of his letter of February 13, 1891, to Hon. I. S. Struble, chairman of the Committee on Territories of the House of Representatives of the Fifty-first Congress, upon the nature of the title by which the Cherokee Nation hold the Cherokee Outlet, and of the report thereon by the Commissioner of Indian Affairs, dated January 26, 1892, both of which are referred to in the opinion of February 25, 1892, by the Assistant Attorney-General for the Interior Department, upon the legality of the agreement between the United States and the Cherokee Nation, providing for the cession of the Cherokee Outlet to the United States.

In response thereto I have the honor to transmit herewith copies of the papers called for.

I have the honor to be, very respectfully,

JOHN W. NOBLE,
Secretary.

The PRESIDENT OF THE SENATE.

DEPARTMENT OF THE INTERIOR,
Washington, February 13, 1891.

SIR: On January 17, 1891, Mr. Mansur introduced in the House of Representatives a bill which in effect proposed to appropriate $7,489,718.72, to pay the Cherokee Nation at the rate of $1.25 per acre, for any title, claim, or interest they might have to land within what is known as the Cherokee Outlet. If the Cherokees upon due notice refuse to accept the provisions of said act, the President is authorized,

within ninety days after ascertaining such refusal, by proclamation to declare said outlet to be incorporated into and be a part of the Territory of Oklahoma, and subject to the laws thereof, and thereafter said lands are to be opened to settlement under the homestead and town-site laws on conditions prescribed.

This bill was referred to the Committee on Territories, and by you inclosed to this Department with a request for my views as to the desirability for a favorable report on the measure and passage thereof by Congress at this session. On receipt of this request the matter was inadvertently referred by the Assistant Secretary to the Commissioner of Indian Affairs; and herewith is sent a copy of the report of that officer.

By way of premise the Commissioner states that no action of the executive officers of the Government, nor the provisions of treaties with the Cherokees prior to that of May 6, 1828 (7 Stats., 311), have any bearing upon the present status of the Cherokee Outlet. After referring to that and other treaties, and the citation of decisions supposed to be applicable to the questions involved, he arrives at the conclusion that up to the date of the treaty of July 19, 1866 (14 Stats., 799), "the Cherokees had a full and complete fee-simple title to the lands embraced in the Cherokee Outlet."

He then considers the effect of the treaty of 1866, and concludes that it does not change or modify the title to said lands, but simply gives the United States the right to settle friendly Indians thereon to whom the Cherokees were to sell at a price to be determined; and he holds, as to such lands as have not been so sold, "they are absolutely private property, in which the United States has no more interest than has a State in private lands which are liable to escheat." He has no doubt that the appropriation of this land in accordance with the provisions of the bill, without the assent of the Cherokees, would be decided on appeal to the courts to be "illegal and void," and for the Government to open the outlet in the manner proposed would be "to disregard its solemn obligations and violate its faith in order to accomplish that purpose."

The careful consideration which I have given to the subject does not sustain the conclusions arrived at by the Commissioner, for, in writing to Gen. Fairchild, chairman of the Cherokee Commission, under date of October 26, 1889, in relation to the purchase of the claim of the Indians to this outlet, I said:

> The United States must be sovereign within the limits of its own territory. It is conscious of a purpose to wrong no one, and yet to allow its own people to expand over the land that is theirs; to give to the Indians of the Cherokee Nation an income not only most munificent, but permanent, for the outlet to which the Government already has fee-simple title, subject to the use its title indicates, and upon which it might settle adverse tribes without paying the Cherokees therefor more than would be due under appraisement already made than 47.49 cents per acre.

After reading the report of the Commissioner, examining the treaties and decisions cited by him, and further consideration of the subject, I see no reason for changing the views then expressed as to the title of the Outlet. Therefore, in sending you a copy of his letter it seems proper that the reasons which prevent me from coming to the same conclusions should be stated; and also that the many errors of law and fact into which the Commissioner has fallen should be pointed out.

It is not necessary in this connection to rehearse the well-known history of, and all the dealings of the United States with, the Cherokees. It is sufficient to say that prior to 1817 all of the Cherokees resided east of the Mississippi. By treaty of that year they ceded certain of

their lands to the United States, and it was agreed that such of them as would settle west of the Mississippi on the Arkansas River should receive their due proportion, acre for acre, in exchange for the ceded lands. The treaties were to continue in full force with those remaining east as well as those going west of the Mississippi. The Government was anxious, for good reasons, to locate them altogether upon the Arkansas River, and many efforts were made to that end. In March, 1818, President Monroe wrote to the chief of the Arkansas branch as follows:

> It is my wish that you should have no limits to the west, so that you may have good mill seats, plenty of game, and not be surrounded by the white people.

And on October 8, 1821, Mr. Calhoun, the Secretary of War, under whose charge the Indians were, wrote to the chiefs of the Arkansas Cherokees as follows:

> It is to be always understood that in removing the white settlers from Lovely's purchase, for the purpose of giving the *outlet* promised you to the west, you acquire thereby no *right to the soil, but merely to an outlet*, of which you appear to be already apprised, and that the *Government reserves to itself the right of making such disposition as it may think proper with regard to the salt springs upon that tract of country.*

Then follows the treaty of May 2, 1828 (7 Stats., 311), in the preamble of which special reference is made to "the pledges given them by the President of the United States and the Secretary of War of March, 1818, and 8th October, 1821, in regard to the outlet to the west, and as may be seen by referring to the records of the War Department."

This shows that the Commissioner's statement, that "neither the action of the executive officers of the Government, nor the provisions of the treaties with the Cherokee Nation, concluded prior to the treaty of May 6, 1828, have any bearing upon the status of the Cherokee Outlet," is erroneous. On the contrary, such executive action was the basis of the treaty itself.

By section 2 of the treaty, the possession of 7,000,000 acres is guaranteed to the Cherokees forever by specified bounds, and

> In addition to the 7,000,000 of acres thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual *outlet* west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extend.

This is the first grant of the outlet west, and it must be apparent that at this time it was the purpose of the United States only to grant, and the Cherokees expected only to get—in the language of Mr. Calhoun, made a part of the treaty by reference—"no right to the soil, but merely to an outlet;" a mere right to pass to and from the domain west, an easement or franchise only.

In consequence of the selection by the Creek Indians of a portion of the lands of the Cherokees, on February 14, 1833 (7 Stats., 414), another treaty was made, whereby the lands of the Cherokees are again defined, with the same provision as to the outlet; with, however, a reservation to the United States to permit other Indians to get salt thereon, and the stipulation that letters patent are to be issued as soon as practicable "for the land hereby guaranteed."

By section 5 of this treaty it is said:

> These articles of agreement and convention are to be considered supplementary to the treaty, before mentioned, between the United States and the Cherokee Nation west of the Mississippi, dated 6th of May, 1828, and not to vary the rights of the parties to said treaty; and, further, that said treaty is inconsistent with the provisions of this treaty, now concluded, or these articles of convention and agreement.

It must be apparent that this treaty did not change what was before an easement into a fee simple.

By a further treaty of December 29, 1835 (7 Stats., 478), in consideration of $5,000,000, the Cherokees ceded to the United States all their lands east of the Mississippi.

In article 2 reference is made to the agreements in the two preceding treaties to convey the 7,000,000 acres and the guarantee of the outlet in the same terms as theretofore; it is then agreed that, in consideration of $500,000, the United States shall convey in fee simple to the Cherokees an additional tract of land, amounting to 800,000 acres, part of the Osage Reserve in Kansas, and sometimes known as the Neutral Lands. And by section 3 it was provided:

> The United States also agree that the lands above ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty, shall all be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States, according to the provisions of the act of May 28, 1830.

The act of 1830 here referred to authorized the President to exchange lands with the Indians residing east of the Mississippi for lands west thereof, and to issue to them, if they desire, a patent for the same; said lands to revert to the United States "if the Indians become extinct or abandon the same."

On December 31, 1838, a patent was issued to the Cherokees, and particular attention is called to its recitals:

> Whereas by certain treaties made by the United States of America with the Cherokee Nation of Indians of the sixth of May, one thousand eight hundred and twenty-eight; the fourteenth of February, one thousand eight hundred and thirty-three; and the twenty-ninth of December, one thousand eight hundred and thirty-five, it was stipulated and agreed on the part of the United States that, in consideration of the promises made in the said treaties, respectively, the United States should guarantee, secure, and convey by patent to the said Cherokee Nation certain tracts of land; the descriptions of which tracts and the terms and conditions on which they were to be conveyed are set forth in the second and third articles of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, in the words following. (Col. 9, Records of Patents, G. L. O., p. 34.)

Then are quoted at length articles 2 and 3 of said treaty, followed by a description of the tract of 7,000,000 acres and of the outlet as surveyed, and also of the tract of 800,000 acres; then follows the granting clause, which recites that "in execution of the agreements and stipulations contained in said several treaties," the United States give and grant to the Cherokee Nation the described land, to have and to hold the same, "with the rights, privileges, and appurtenances thereunto belonging to the said Cherokee Nation forever," subject, however, to the right reserved to permit other Indians to procure salt, which has been ascertained to be within the limits prescribed for "the outlet agreed to be granted;" "and subject also to all other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved;" and subject also to the condition of reversion as provided by the act of May 28, 1830, *supra*.

All of these conditions and recitals are omitted from the Commissioner's report, except that referring to the act of May 28, 1830.

It seems to me evident that it was not intended by the patent to convey to the Cherokees any other interest or estate in the outlet than was originally given them. It is expressly stated to be made subject to the reserved rights of the United States, to the extent and in the manner reserved. What those reservations are is made plain by references and recitals. Article 2 of the treaty of 1835 is recited at

length, and this on its face purports to be, and is, a recital from the treaty of 1828 and of 1833 (*supra*). This last treaty declares it is supplementary, and is not intended to vary the rights of the parties to the former; and that treaty shows the grant of the outlet to have been made subject to the conditions stated by Mr. Calhoun, Secretary of War, in his letter of October 8, 1821, where he declares the grant is made upon the condition, which the Indians well understood, that they are to "acqnire thereby no right to the soil, but merely an outlet."

So that, by all rules of construction, in contemplation of law, the letter of Mr. Calhoun is as much a part of the condition of the patent as if it were spread at length therein, and it was not intended by the patent to attempt to convey to the Cherokees a larger estate than was originally granted them.

But if such intention existed, the patent is ineffective to convey a larger estate than was given by the grant. A patent is not a grant, it is but evidence thereof; a muniment of title, and not the title itself. It can not enlarge or change a grant, nor diminish it by its recitals; where error is committed in its recitals, the patentee only takes the estate originally granted. (E. N. Marsh, 5 L. D., 96; Gazzam *v.* Phillips, 20 How., 372; Cragin *v.* Powell, 128 U. S., 692.)

The Commissioner seems to have been misled by the general terms in which the habendum clause of the patent is couched, and to have lost sight of the conditions of the original grant, which are iterated and reiterated in the several treaties, and finally so referred to in the patent so as to make them part thereof. The guaranty was of "a perpetual outlet," and when the Government proceeded to give its deed for the same it was very properly stated therein that the land was so granted "forever." This is very different from conveying a fee simple title. The fact that the right of way or perpetual outlet was embraced in the same clause and covered by the very language whereby the fee simple title to the other two tracts was intended to be conveyed no more makes the easement a fee simple than that the converse would be true. Both titles were in perpetuity, but of different degrees. In the one case the patent evidenced the fact that the fee simple title had passed from the United States, and in the other that the easement had passed while the fee remained in the United States.

The case of Holden *v.* Joy (17 Wall., 211), cited by the Commissioner to sustain his views, in no respect does so. The 800,000-acre tract heretofore mentioned, and known as the Neutral Lands, having been ceded by the Cherokees to the United States to sell and to hold in trust the proceeds for them, the court was considering only the title to that particular tract, and held that the Indian title thereto was fee simple. Mention of or the slightest reference to the outlet is not made throughout the decision. It is an entire misconception of its purport on the part of the Commissioner to quote it as authority to sustain the proposition that the title of the Indians to the outlet is a fee simple. Even the citation made by him from the decision to support the proposition that the condition in the patent as to the abandonment by the Indians was void does not sustain him, as that question was not decided by the court, but was expressly reserved, as would have been shown if he had quoted the remainder of the sentence.

The case of the United States *v.* Reese, in 5 Dill., 405, referred to by him as in 8 Cent. L. J., throws no light on the subject. The question there was whether the Indians had a fee simple title to lands within the Cherokee Nation. The court so held, and discharged a party charged with timber trespass, under section 5388, Revised Statutes, upon the

7,000,000-acre tract. The question of title to the outlet was not involved.

In the case of the United States *v.* Rogers (23 Fed. Rep., 657) Judge Parker, after reading and quoting from the patent of December 31, 1838, says, the title of the Indians to the outlet is "substantially the same kind of a title" as that by which they held their other lands, "the only difference being that the outlet is encumbered with the stipulation" that other Indians may be permitted to get salt thereon. He maintained the jurisdiction of the district court of the western district of Arkansas in the matter, and discharged the party charged with arson for want of jurisdiction over the lands in the outlet, which he declared to be "set apart and occupied" by the Cherokees. But in this case the judge, in the examination leading up to his opinion on the question of title, satisfies himself by stating in a general way that the outlet was granted by the treaties, and then looks only to the patent to see what was granted, and quotes from the descriptive and habendum clauses thereof, and does not quote its recitals from the treaties.

This somewhat cursory examination of the question of title much weakens the force of that decision. Besides, the question of the title by which the Cherokees held the outlet, was not directly involved in that case, as the learned judge says (p. 665):

> By the treaties and patent above referred to the Cherokee Outlet was beyond question *set apart* to the Cherokees, and to that extent was in a condition the converse of that which is necessary to attach it to the district of Kansas. It matters not what may have been the extent of their title. If they had a title of any degree whatever, it was *set apart* to them.

He then showed that it was "occupied" by the Cherokees, and therefore concluded that "it does not come within the designation of Indian country not set apart and occupied by the Cherokees;" and upon that ground discharged the prisoner.

In the case of Wolf (27 Fed. Rep., p. 611), cited by the Commissioner, the question was one of conspiracy to defraud the Cherokee Nation out of certain moneys, and the same judge, in delivering his opinion, referred to the Rogers case, just quoted, as determining that the Indians had a fee-simple title to the outlet, though that question was not directly involved in the case.

The Commissioner quotes the case of the United States *v.* Soule (30 Fed. Rep., 918) as deciding "that no distinction was made in the granting clause (treaty of 1833) between the 7,000,000-acre tract and the outlet." In this he is mistaken. Judge (now Mr. Justice) Brewer, of the United States Supreme Court, who delivered the opinion of the United circuit court of the district of Kansas in that case, after referring to the proviso in the treaty of 1833 relative to the issue of letters patent, then says:

> In pursuance of this treaty, patent was issued for all the lands, including the outlet west. No distinction was made in the granting clause between the 7,000,000-acre tract and the outlet west.

By ev ry rule of grammatical construction it is the granting clause of the *patent* to which the judge here refers, and not the treaty of 1833, as interpolated by the Commissioner.

In this last case the judge of the circuit court refers to and dissents from the former decision of Judge Parker in the Rogers case, both on the question of the jurisdiction of the district court of Arkansas over the outlet and the estate of the Indians in the outlet. In passing upon this point Judge Brewer examines the character of that estate. Going

back to the treaty of 1828, he traces the title down, and sums up his conclusions as follows:

> Manifestly Congress set apart that 7,000,000 acres as a home, and that was thereafter to be regarded as set apart and occupied, "because," as expressed in the preamble of the treaty, "Congress was intent upon securing a permanent home." Beyond that the guaranty was of an outlet—not a territory for residence, but for passage ground—over which the Cherokees might pass to all the unoccupied domains west. But while the exclusive right to this outlet was guaranteed, while patent was issued conveying this outlet, it was described and intended obviously as an outlet and not as a home. So, whatever rights of property the Cherokees may have in this outlet, it was not territory set apart as a home, and is not territory within the language of the act of 1883, "set apart and occupied" by the Cherokee tribe.

This conflict between Judges Parker and Brewer (the latter presiding in the higher court) must further weaken the force of the opinion of the former.

In the Commissioner's letter it is remarked that in the fifth article of the treaty of 1835 with the Cherokee Nation, the United States covenanted and agreed that the lands ceded to the Cherokee Nation, including the 7,000,000 acres "and the outlet," shall at no future time, without their consent, be included in the territorial limits of any State or Territory.

A different construction may be placed on this article. It is to the effect that the United States "hereby covenant and agree that the *lands* ceded to the Cherokee Nation in the foregoing article" shall not, without their consent, be included, etc. The *lands* here referred to are those mentioned in the third article, I think, beyond any question. That article says:

> The United States also agree that the *lands above ceded* by the treaty of February 14, 1833, including the outlet and those ceded by this treaty, shall be included in one patent executed to the Cherokee Nation of Indians, etc.

Congress did not seem to consider the outlet as being of the "*ceded lands*," the plain intendment of that section being that the ceded lands under both treaties, and also the right to the outlet—a mere easement—shall be included in one patent. But even if the intention was to designate the outlet as ceded lands, it by no means follows that a fee-simple title passes by the cession, and under the doctrine of the Cherokee Tobacco case (*infra*) and the act of March 3, 1871 (*infra*), the Government has a right to exercise sovereignty over said lands as it pleases.

I think there ought to be no doubt, on the review of the matter, in concluding that the estate of the Indians in the outlet is only an easement, which secures them a mere right to use and occupy it for specified purposes. Such a grant by the Government is not a peculiar or unusual one, for in many treaties setting apart reservations as the home of certain tribes a provision is also inserted authorizing them to use for hunting purposes other tracts of land for an indefinite period.

By Article 10 of the Cherokee treaty of 1866 (14 Stats., 799), the Cherokees were guaranteed the right to sell products within their nation without paying any tax thereon to the United States. By act of 1868 (15 Stats., 167) the United States levied a tax upon tobacco "produced anywhere within the exterior boundaries of the United States."

A levy of the proper tax was made upon certain tobacco grown within the Cherokee Nation, and the right to do so being contested, the question came before the Supreme Court of the United States, whose decision, sustaining the right of levying the tax under the statute as against the exemption claimed under the treaty, will be found in the case of "The Cherokee Tobacco" (11 Wallace, p. 617).

The following clause was inserted in the Indian appropriation bill of March 3, 1871 (16 Stats., 566):

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligations of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

This proviso took nothing from the force of the enactment and added nothing to the strength of the treaty obligations in existence. It simply declared the law as the Supreme Court had repeatedly decided it to be. No treaty obligations were to be impaired by the enactment itself. Those obligations were to remain in unimpaired vigor, subject, however, thereafter, as they had been theretofore, to the paramount right of the political department of the Government to repeal them by Congressional enactment whenever thought proper, a right incident to the sovereign power of the Government and essential to its existence. See the Chinese exclusion case (130 U. S., 581, 600), and the cases therein cited. Also see Cherokee Nation *v.* Southern Kansas Railway Company (135 U. S., 641, 653–655.)

This act was afterwards referred to by the Supreme Court in the case of the United States *v.* Kagama (118 U. S., 375), and it will be seen by reading the decisions referred to that neither Congress nor the Supreme Court thought that the exercise of the right thus to legislate was "to disregard its solemn obligations and violate its faith."

Sufficient has been said, I think, to show many errors of law and fact in said report, and to sustain the views entertained by me. And I regret that the Commissioner should have thought proper to charge that those who differ from him in judgment are "disregarding solemn obligations and violating plighted faith," instead of confining himself to an expression of his views on the law and facts, as requested.

In conclusion, the Commissioner says that from the reports recently received from the Board of Commissioners appointed under the provisions of the Indian appropriation bill of March 2, 1889 (25 Stats., 980, 1005), to negotiate for the cession of these lands, it is indicated that the differences between them and the Cherokees may yet be reconciled, and the United States acquire by consent of the Indians a clear title to said lands without having recourse to the proposed legislation. In this I regret to say that he seems also to be mistaken. Recent communications from the Board of Commissioners show that negotiations during the past year have been barren of results, if not entirely futile. Propositions have been made by our Commissioners which were met by counter propositions, some of which were so extravagant and unheard-of in character that the Commissioners were compelled to decline all discussions in relation to them. And now, after repeated effort to bring about an amicable settlement of these matters, no agreement has been reached, and the negotiations have come to an end. Whether they will be renewed and with what results remains for the future to disclose. So far as I can see we are now no nearer amicable arrangement than we were at the beginning.

I therefore think, in view of what has been said, and of other considerations not necessary to press upon you now, that if Congress intends to open up the Cherokee strip to settlement, the measure proposed, or some similar law, should be speedily enacted.

Of course, the fo egoing views must be taken to be applicable only to the Cherokee Outlet, in which I believe the Indians have only an ease-

ment, which Congress has power to declare at an end upon reasonable compensation for such interest.

Very respectfully,

JOHN W. NOBLE,
Secretary.

Hon. I. S. STRUBLE,
Chairman Committee on Territories, House of Representatives.

DEPARTMENT OF THE INTERIOR,
OFICE OF INDIAN AFFAIRS,
Washington, January 26, 1892.

SIR: I received in due course of business your communication, dated February 14, 1891, with which you transmitted for my information copy of Department letter dated February 13, 1891, addressed to Hon. I. S. Struble, in the matter of House bill 13195, relative to the Cherokee Outlet.

In view of your intimation that further discussion was not desired, I refrained from making any reply. As your letter, however, has been published in connection with your annual report, and as the matter involved is of the very highest moment, and inasmuch as the statement is made that the Commissioner of Indian Affairs has fallen into many errors of law and fact, it seems obligatory upon me to lay before you a further discussion of the subject in question.

If the office has fallen into errors of law and of fact the Commissioner will be very glad to have such errors distinctly pointed out, because he has no other desire than to state the case accurately and in strict conformity with both the law and the facts. If, however, the statement of the case, as presented by this office, is a correct one and accords with both the law and the facts, I can not believe otherwise than that you will welcome such a statement.

I am sure that personal considerations do not weigh with me in this matter, and that my only purpose is to arrive at such a conclusion as will stand the test of the most searching criticism and the final arbitrament of the courts.

In my report, after giving the substance of the provisions of the bill, I stated that "neither the action of the executive officers of the Government nor the provisions of the treaties with the Cherokee Nation concluded prior to the treaty of May 6, 1828 (7 Stats., 311), have any bearing upon the present status of the Cherokee Outlet." This statement you regard as erroneous. You quote from the letter of President Monroe, of March, 1818, and that of the Secretary of War, of October 8, 1821, and say:

> Then follows the treaty of May 2, 1828 (7 Stats., 311), in the preamble of which special reference is made to "the pledges given them by the President of the United States and the Secretary of War, of March, 1818, and October 8, 1821, in regard to the outlet to the west, and as may be seen on referring to the records of the War Department."

It is perhaps immaterial, but reference to the statute shows that, by rules of grammatical construction, the clause last quoted belongs to what follows it, and not to the pledges referred to. The whole clause of the preamble from which the quotation is taken reads as follows:

> And whereas the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and

yet not questioning their right to their lands in Arkansas as secured to them by treaty, and resting also upon the pledges given them by the President of the United States and the Secretary of War, of March, 1818, and 8th of October, 1821, in regard to the outlet to the west, and as may be seen on referring to the records of the War Department, still being anxious to secure a permanent home, and to free themselves and their posterity from an embarrassing connection with the Territory of Arkansas and guard themselves from such connections in the future.

It will be seen that the letters of the President and Secretary are not referred to as on record in the War Department. What "may be seen on referring to the records of the War Department" is that the Cherokees are still "anxious to secure a permanent home," etc.

It is to be further remarked that the "outlet" referred to by Mr. Calhoun is not the "outlet" under discussion, but another one embracing a much larger extent of country. (See "The Cherokee Nation of Indians," by C. C. Royce, p. 246 and map No. 9. Also, second article of treaty of 1833.)

You quote from subsequent treaties and the patent, and conclude that the treaty shows the grant of the outlet to have been made subject to the conditions stated by Mr. Calhoun, that by all rules of construction in contemplation of law, the letter of Mr. Calhoun is as much a part of the condition of the patent as if it were spread at length therein, and that it was not intended by the patent to attempt to convey to the Cherokees a larger estate than was originally granted them.

I can not reach the conclusion that the declaration of Mr. Calhoun that "you acquire thereby no right to the soil, but merely to an outlet," etc., was made a part of the original grant.

It is not referred to in the body of the treaty as limiting, controlling, or defining the title or estate to be conveyed. It is found in the preamble, which recites the object of the parties in making the treaty and the reasons moving them thereto. The grantor does not refer to it, but the Cherokees give it as one of these reasons.

According to Bouvier, "In the interpretation of a statute, though resort may be had to the preamble, it can not limit or control the express provisions of the statute." The grant of the Outlet and other lands was made by the second article of the treaty, which contains no reference to these pledges, and in construing the grant the courts do not appear to have found it necessary to refer to the preamble. But if we are to look outside of the several treaties and patents, then declarations made contemporaneously with the treaty of 1835, and with direct reference to the present outlet, would seem to be entitled to much greater consideration than the statement made by Secretary Calhoun with reference to another outlet seven years before the first treaty relating to these lands was concluded.

March 14, 1835, articles of a treaty were agreed upon in this city by J. F. Schermerhorn, on the part of the United States, and a delegation of Cherokee Indians, which treaty (according to the title page of the printed articles) "by the President of the United States, is directed to be submitted to the Cherokee Nation of Indians for their consideration and approbation." This provisional treaty is substantially the same as that concluded at New Echota, December 29, 1835 (7 Stats., 478).

In a memorandum prepared by the Secretary of War, Hon. Lewis Cass, and delivered to Senator King, of Georgia, February 28, 1835, referring to the two delegations of Eastern Cherokees then in the city, one headed by John Ross and the other by John Ridge, he states that the discussion between the latter and Mr. Schermerhorn on the part of the Government have terminated in a general understanding respect-

ing the basis of the arrangements. He then refers to the pecuniary considerations and says:

Besides these pecuniary stipulations a tract of very valuable land, estimated to contain about 800,000 acres west of the Mississippi, is to be added to the territory already possessed by them. This territory originally contained about 7,000,000 acres, in addition to which they were entitled to the use of another tract containing about 6,000,000 acres for the purpose of an outlet or communication with the tribes and country west of them. It is proposed in the arrangement with Ridge and his party to grant them *the entire property of this tract of 6,000,000 acres for their unconditional use;* this will make, for the whole country given and proposed to be given to them west of the Mississippi, 13,800,000 acres of land. (Senate Ex. Doc. 120, Twenty-fifth Congress, second session, p. 98.)

The italics are mine.

The Secretary thus indicates with clearness and beyond the possibility of mistake that whatever the intention had been under the previous treaties it had now been determined to vest the "entire property" of the Outlet in the Cherokees. It will be noticed that this declaration was made before the provisional treaty had been signed by the parties thereto. This memorandum, as is stated therein, had been previously submitted to the President and the course there indicated had been approved by him.

March 16, 1835, President Jackson addressed a communication to the Cherokee delegation in which he refers to the treaty just concluded (which was to be void unless approved by the Cherokee people) and says:

I shall in the course of a short time appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you more fully my views and the nature of the stipulations which are offered to you.

These stipulations provide—

(1) For an addition to the country already assigned to you west of the Mississippi, and for the conveyance of *the whole of it* by patent *in fee simple.* * * *

There are few separate communities whose property, if divided, would give to the persons comprising them such an amount.

It is enough to establish you all in the most comfortable manner; and it is to be observed that besides this there are *thirteen millions of acres conveyed* to the Western Cherokees and yourselves by former treaties, and which are destined for your and their *permanent residence.* So that your whole country west of the Mississippi will contain not less than thirteen millions eight hundred thousand acres.

The italics are mine.

This is not only a contemporaneous declaration by one of the contracting parties as to the nature of the estate promised in the new treaty, but an interpretation by the highest executive officer of what had been conveyed to them by former treaties.

If the letter of Mr. Calhoun "is as much a part of the condition of the patent as if it were spread at length therein," why is not the solemn declaration of the President that the Outlet lands (which must be included to make the 13,800,000 acres) are destined for their permanent residence, although not incorporated in the preamble, as much a part of the condition of the patent as though it were spread at length therein; and if so, why does not the latter declaration (not to mention its higher authority) supersede and override the former?

Again, in a report to the Commissioner of Indian Affairs, dated August 3, 1835, Mr. Schermerhorn, who was endeavoring to secure the ratification by the Cherokees of the treaty of 1835, quotes an address made by him in council on July 20, 1835, in which he makes the following statement (Senate Ex. Doc. 120, Twenty-fifth Congress, second session, p. 456):

Articles 2 and 3 declare that you are to have $4,500,000 in money, to be paid as stipulated in the following articles, and 800,000 acres of land, in addition to the

lands already secured to the Cherokee Nation in the treaties with the Cherokees west; and that this is to be in full of all your lands east of the Mississippi, and your claims upon the United States. The whole quantity of lands that you will now have west secured by this and other treaties will be 13,800,000 acres, which is more than all the lands the whole Cherokee Nation owned before the treaty with Gen. Andrew Jackson in 1817, by which they were to have acre for acre for their lands east on the west of the Mississippi. I say you will have more land than you had there; for by that treaty you sold to the United States about 4,000,000 acres and you still own here about 7,000,000 acres, making in all 11,000,000 acres, so that without the 800,000 acres which you buy by this treaty, you will have 2,000,000 acres more west of the Mississippi than you had here before the treaty of 1817. The fourth article declares that all of your lands west shall be secured to you by a patent deed from the President of the United States, and you will hold it by the same title the white man holds his lands, as long as you exist as a State and reside upon it.

I believe that I have not fallen into error of law or fact in stating that—

Neither the action of the executive officers of the Government nor the provisions of the treaties with the Cherokee Nation concluded prior to the treaty of May 6, 1828 (7 Stats., 311), have any bearing upon the present status of the Cherokee Outlet.

It must be remembered that the treaties of 1828 and 1833 had been made with the "Western Cherokees" or those who had removed to the west. But notwithstanding all the efforts put forth by the Government, only a comparatively small portion of the Cherokees had so removed.

In a work entitled "The Cherokee Nation of Indians, by Charles C. Royce," printed in an extract from the Fifth Annual Report of the Bureau of Ethnology, Mr. Royce thus refers to the situation at this time (p. 266):

Georgia refused to submit to the decision (Worcester *vs.* State of Georgia, 6 Pet., 515) and alleged that the court possessed no right to pronounce it, she being by the Constitution of the United States a sovereign and independent State, and no new State could be formed within her limits without her consent.

The President was thus placed between two fires, Georgia demanding the force of his authority to protect her constitutional rights by refusing to enforce the decision of the court, and the Cherokees demanding the maintenance of their rights as guaranteed them under the treaty of 1791, and sustained by the decision of the Supreme Court.

It was manifest the request of both could not be complied with. If he assented to the desire of the Cherokees a civil war was likely to ensue with the State of Georgia. If he did not enforce the decision and protect the Cherokees, the faith of the nation would be violated. In this dilemma a treaty was looked upon as the only alternative, by which the Cherokees should relinquish to the United States all their interest in lands east of the Mississippi and remove to the west of that river, and more earnest, urgent, and persistent pressure than before was applied from this time forward to compel their acquiescence in such a scheme.

In view of this situation and of the positive declaration of Secretary Cass and President Jackson we may not conclude that the treaty-making power was willing to make further concessions as to lands as well as moneys, and, as a result, that whatever had been the status of the Outlet under the treaties of 1828 and 1833, the *fee* was intended to be conveyed and actually was conveyed by the treaty of 1835, which stipulated that the Outlet should be included in a patent, to be issued under the provisions of the act of 1830.

It is to be further observed that the treaties of 1828 and 1833 had been made with the Western Cherokees, as before stated. These were a small proportion of the Cherokee people, had been resident in Arkansas, and were known as "hunters," while the great mass of the people, resident in Georgia, Tennessee, and the adjoining States, had abandoned the hunter life. As was said by John Ross:

The wilderness has given place to comfortable dwellings and cultivated fields, stocked with domestic animals. Mental culture, industrious habits, and domestic enjoyments have succeeded the rudeness of the savage state.

While to the former class an "outlet," over which they could roam and hunt, would have been a valuable possession, it would have been wholly useless to the latter class.

In the light of this contemporaneous evidence, not before me when I prepared my previous report, I am inclined to believe that I would have been justified in stating that it was unnecessary to go back of the treaty of 1835 and the negotiations attending it, to determine the status of the Outlet.

In the treaty of August 6, 1846 (9 Stats., 871) made with the three parties into which the Cherokees were divided, it is provided—

> That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of eighteen hundred and thirty-five, and in the third section of the act of Congress approved May twenty-eighth, eighteen hundred and thirty, which authorizes the President of the United States, in making exchanges of lands with Indian tribes, to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them and their heirs or successors the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States if the Indians shall become extinct or shall abandon the same.

It will be observed that reference is made to the treaty of 1835 only, and not to the treaties of 1828 and 1833.

I may remark in passing that the object in making this treaty of 1846 and the stipulating for the issuance of a patent which had already issued is set out in a recent opinion of the Court of Claims, in the case of the Western Cherokees:

> That treaty was a compact between three parties, the United States, the Eastern, and the Western Cherokees. Its purpose was to make the Eastern and the Western Cherokees parties to the treaty of New Echota, which they had never conceded themselves to be, and to secure peace in the Cherokee country. The principle upon which it is sought to accomplish this purpose was that on the one hand the Western Cherokees should participate in the purchase money which had been paid for the lands east of the Mississippi, and on the other that they should abandon their autonomy and become subject to the government which had been established by the Eastern Cherokees.
>
> The reason behind the principle was that in 1835 the Western Cherokees owned the Cherokee country west and had paid for it, and that the Eastern Cherokees acquired, by the terms of the treaty of New Echota, two-thirds of this without paying for it, and at the same time retained all of the purchase money which had been given for their possession east of the Mississippi. A portion of this purchase money had been expended for the use of the Eastern Cherokees, and a portion was held as a trust for their benefit; the remainder had been paid to them per capita.
>
> If their removal had been effected on the same terms as that of the Western Cherokees under the treaty of 1828, they would have received land in the Indian Territory in exchange for land east of the Mississippi.
>
> As it was, they had received both land and money; but the land was the land of the Western Cherokees. Strictly, the Government should have paid the Western Cherokees for the lands thus appropriated, and should have deducted the price from the money paid to the Eastern Cherokees. It was now sought by the treaty of 1846 to accomplish this in an indirect way—the Western Cherokees were to be admitted *ab initio* to a quasi partnership or joint ownership by the terms of which they were to contribute the land in the Indian Territory and share in the proceeds of the land east of the Mississippi.

You cite authorities to show that a patent is not a grant, and state that I appear to have been misled by the general terms in which the habendum clause of the patent is couched, and to have lost sight of the conditions of the original grant, which are iterated and reiterated in

the several treaties, and so referred to in the patent as to make them part thereof. You say:

> The guaranty was of "a perpetual outlet," and when the Government proceeded to give its deed for the same, it was very properly stated therein that the land was so granted "forever." This is very different from conveying a fee simple title. The fact that the right of way or perpetual outlet was embraced in the same clause and covered by the very language whereby the fee simple title to the other two tracts was intended to be conveyed, no more makes the easement a fee simple than the converse would be true. Both titles were in perpetuity, but of different degrees. In the one case the patent evidenced the fact that the fee simple title had passed from the United States, and in the other that the easement had passed, while the fee remained in the United States.

It is true that a patent is not a grant, but evidence thereof. It is, however, "the highest evidence of title and is conclusive as against the Government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal." (United States *v.* Stone, 2 Wall., 525.) It is, moreover, conclusive evidence of title. (Gibson *v.* Choteau, 13 Wall., 92.) The recitals in a patent are conclusive. (Crews *v.* Barcham, 1 Black, 352.)

But let us see if I was misled by the habendum clause. The patent refers to the treaties of 1828, 1833, and 1835, by which "it was stipulated and agreed on the part of the United States that in consideration of the promises mentioned in said treaties, respectively, the United States should guarantee, secure, and convey by patent to the said Cherokee Nation certain tracts of land." It quotes the whole of the second and third articles of the treaty of 1835. In passing, allow me to remark that the second article contains the following significant clause:

> *Provided, however,* That if the Saline or Salt Plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees.

This is also contained in the treaty of 1833.

If the Cherokees were to receive only an easement and the fee remained in the United States, where was the necessity for the United States to reserve the right to allow other Indians to get salt, which right could alone exist in the owner of the fee? Moreover, the clause is a recognition of the right of the Cherokees to get salt, which they would not have if their interest was only an easement.

The third article of the treaty contains the following provision:

> The United States also agree that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet and those ceded by this treaty, shall all be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States, according to the provisions of the act of May twenty-eighth, one thousand eight hundred and thirty.

It will be observed that the second article refers to the previous treaties, by the way of recital, to explain the reasons for the additional grant of 800,000 acres.

The third article, however, is an independent proposition, without recital or preamble, by which the United States agrees that the lands ceded by previous treaties, including the outlet and those ceded by this treaty, should be included in one patent, to be executed according to the provisions of the act of 1830 (4 Stats., 411). Under the provisions of that act the President was authorized to exchange lands claimed and occupied within the limits of the States or Territories for

districts of lands, to be laid off and described, in the territory west of the Mississippi. It was made lawful in making any such exchange—

For the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs and successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed for the same.

Under this act, as before seen, the President solemnly assured the Cherokees that the whole of the country assigned to them should be conveyed to them by patent in fee simple, and that this "country" included the outlet is shown by the quantity of land specified, and which was destined for their *permanent residence.*

The patent further recites that the United States have caused the said tract of 7,000,000 acres, together with the perpetual outlet, to be surveyed in one tract, the boundaries of which are described with full particularity, containing 13,574,135.14 acres. It further recites that the United States have caused the tract of 800,000 acres to be surveyed, and describes the boundaries thereof.

The granting clause is as follows:

Therefore, in execution of the agreements and stipulations contained in said several treaties, the United States have given and granted, and by these presents do give and grant unto the said Cherokee Nation the two tracts of land, so surveyed and hereinbefore described, containing, etc.

Then follows the habendum:

To have and to hold the same, together with all the rights, privileges and appurtenances thereto belonging, to the said Cherokee Nation forever,

subject to the saline stipulation, and subject to all other rights reserved to the United States; also to the condition of the act of May 28, 1830, as to abandonment, etc.

If I understand you correctly you would interpret the habendum as follows:

To have and to hold 7,000,000 acres of said first-described tract and the tract of 800,000 acres as a home, and the residue of said first-described tract as a perpetual outlet, together with all the rights, privileges, etc.

If this is the true meaning, I must confess that I have been "misled by the general terms in which the habendum clause of the patent is couched."

It may be remarked here that the western boundary of the 7,000,000 acres has never been ascertained, and no man knows to this day where the "home" ceases and the "outlet" begins. Certain it is that a portion of the lands west of 96° commonly regarded as constituting the outlet are a part of the home, for the Cherokee country without any of these lands comprises but 5,031,351 acres. The distinction between the home and the outlet appears to have been wholly obliterated by the treaty of 1835.

Again, by the treaty of 1817 (7 Stats., 156) the Cherokees were to have acre for acre for their lands east on the west of the Mississippi. According to Commissioner Schermerhorn they were entitled to 11,000,000 acres, or 4,000,000 acres more than the "home" contained.

You state that the case of Holden *v.* Joy (17 Wall., 211), cited by me to sustain my views, in no respect does so; that not the slightest reference to the outlet is made throughout the decision; that it is an entire misconception to quote it as authority to sustain the proposition that the title of the Indians to the Outlet is a fee simple; and that even the citation made to support the proposition that the condition in the patent as to abandonment by the Indians was void, does not sustain

me, as that question was not decided by the court, but was expressly reserved, as would have been shown if I had quoted the remainder of the sentence.

This case was not cited by me as conclusive of the title to the "Outlet," but it has always been regarded as the basis of all subsequent decisions bearing upon Cherokee titles. It fixes the status of the tract of 800,000 acres conveyed by the treaty of 1835.

It was quoted as showing the status of the title generally, and from this basis I attempted to show the status of the "Outlet" by quoting other decisions holding that the title to the latter was the same as to the other lands.

You state that the citation made from that decision does not sustain me, as the question was not decided by the court, but was expressly reserved, as would have been shown if I had quoted the remainder of the sentence. As to this I desire to remark that at the time the report was prepared by this office it was not in possession of the Supreme Court reports. I was therefore compelled to quote at second hand from an Executive document (H. R. No. 54, Forty-seventh Congress, second session).

The citation, moreover, precisely as given by me, appears in the printed instructions given the Cherokee Commission by my predecessor and approved by you (p. 10), and in the same connection. In fact, my report was based largely upon these two papers. The sentence omitted from the citation is: "but it is not necessary to decide that point, as it is clear that if it is valid it is a condition subsequent which no one but the grantor in this case can set up under any circumstances."

As the citation is given, however, not as a decision of a point, but as an expression of opinion by the court, which is also apparent from the language quoted, the omission does not appear to be material.

The case of the United States *v.* Reese (5 Dill., 405) you regard as throwing no light on the subject.

While it is true that the trespass with which Reese was charged was committed upon the 7,000,000-acre tract, the following language of the court is significant:

> The Cherokee Nation of Indians derived their title to their lands from the United States by grant. This grant is by virtue of different treaties made between them and the United States. By the second article of the treaty of May 6, 1828 (Rev. Ind. Treat., 54), "the United States agrees to possess and guarantee to the Cherokees, *forever*, seven million acres of land, and this guarantee is hereby solemnly pledged." *This land is a part of the country now occupied by them.*

The italics, except the word "forever," are mine.

The only other part of the country occupied by the Cherokees at that time was the outlet. While the status of the 7,000,000-acre tract only was involved in the case, the words quoted strongly indicate that Judge Parker recognizes no distinction as to the status of the two tracts. This is clearly shown in the later case of United States *v.* Rogers (23 Fed. Rep., 657). The case of Reese was quoted to show the nature of the Cherokee title generally, and as leading up to the case of Rogers. In the latter case Judge Parker says:

> By looking at the title of the Cherokees to their lands we find that they hold them all by substantially the same kind of title, the only difference being that the outlet is incumbered with the stipulation that the United States is to permit other tribes to get salt on the salt plains. With this exception, the title of the Cherokee Nation to the outlet is just as fixed, certain, extensive, and perpetual as the title to any of their lands.

He then quotes from his decision in the Reese case to show what the nature of that title is, concluding with the words: "This in effect puts all the estate in the Cherokee Nation."

You say that Judge Parker's somewhat cursory examination of the question of title much weakens the force of his decision, inasmuch as he "satisfies himself by stating in a general way that the Outlet was granted by the treaties, and then looks only to the patent to see what was granted, and quotes from the descriptive and habendum clauses thereof, and does not quote its recitals from the treaties."

There is probably no officer of the Government, certainly no *judicial* officer, who has had more occasion to investigate the question of the Cherokee title, or who has given the matter more research than Judge Parker. If he fails to quote any recitals from the patent or treaties, may we not reasonably conclude that he did not consider such quotation necessary?

You also say that the question of title by which the Cherokees hold the Outlet was not directly involved in that case, as is shown by a quotation from page 665.

In the case of Wolfe (27 Fed. Rep., 615), Judge Parker says:

> This court held in United States *v.* Rogers (23 Fed. Rep., 659), that the Cherokee Indians hold what is called the Cherokee Outlet by substantially the same kind of title it holds its other lands. The title to all its lands was obtained by grant from the United States.

This case, you say, was one of conspiracy to defraud the Cherokee Nation out of certain moneys, the question of title not being directly involved. These moneys were the proceeds of the sales of lands within the Outlet, the question discussed by Judge Parker being whether the sum ($300,000) was an additional payment for lands already sold and occupied under the sixteenth article of the treaty of 1866, or a payment on account of unsold and unoccupied lands. He shows that the appraisement of these latter lands took away no rights from the Cherokees and gave none to the United States, uses the language above quoted, and adds:

> This principle puts the title fully and completely in the Cherokee Nation, and until it agrees to part with the same, it can not be taken from it. It has not yet agreed to part with these lands except for a specific purpose. It seems to me there need be but little trouble on the question of the title of the Cherokees to their lands, if we but look at this title, and understand its true nature, and are prompted by a sense of duty to do equal and exact justice to the Indians, and to give them that full measure of justice which by law and good conscience belongs to them.

This may be an opinion on a point not directly before the court, but it certainly "leaves but little doubt as to what the decision of that court will be when the direct question arises there."

You refer to my quotation from United States *v.* Soule (30 Fed. Rep., 918), "that no distinction was made in the granting clause (treaty of 1833) between the 7,000,000-acre tract and the Outlet," and state that by all rules of grammatical construction, the judge refers to the granting clause of the patent and not to the treaty. It is true that the words in brackets were interpolated; not, however, by me. The office not being then supplied with the Federal Reporter, a quotation was taken from the Congressional Record, where it appeared in a brief for the Cherokee Nation submitted by Mr. Baker. It is doubtless true that Judge Brewer, by grammatical construction, refers to the granting clause of the patent, but as he does not remark that the patent attempts to confer any greater estate than the treaty, the meaning conveyed appears to be much the same.

In his opinion Judge Brewer refers to Judge Parker's decision in the Rogers case, and states that he is unable to yield to the force of his reasoning, notwithstanding the consideration which its careful preparation compelled, because the geographical argument and the double

description "set apart and occupied," led him to a different conclusion. He held that it was set apart and,

doubtless, in a certain sense, it was occupied because the Cherokee Nation had a title and right to possess it; but if Congress had meant by this act to include all land owned by the Cherokees, the words "set apart" would have been ample and the word "occupied" was superfluous.

But while the exclusive right to this outlet was guaranteed, while the patent was issued conveying this outlet, it was described and intended obviously as an outlet and not as a home. So whatever rights of property the Cherokees may have in this outlet, it was not territory set apart for a home, and is not territory within the language of the act of 1883, "set apart and occupied" by the Cherokee tribe.

Judge Brewer virtually holds that the Cherokees "own" the Outlet.

In the case of the Cherokee Nation *v.* Southern Kansas Railway Company (33 Fed. Rep., 900), the nature of the Cherokee title is further discussed.

This case involved the right of Congress to grant a right of way through the Cherokee lands, the grant in question being through the lands of the outlet. I make the following extract from the syllabus (by the court), omitting the head lines:

8. The title to all the lands of the Cherokee Nation was obtained by grant from the United States. This title is a base, qualified, and determinable fee, without the right of reversion but only the possibility of reversion, in the United States. This, in effect, puts all the estate in the Cherokee Nation.

9. Congress can not grant a right of way over the lands of the Cherokee Nation without its consent, on the ground that the United States has title to such land. If it can do so, it must be done because the Government of the United States can exercise, with reference to the lands of the Cherokee Nation, the right of eminent domain.

10. The Cherokee Nation, while it owns the soil of its country, is under the political control of the United States, and it is dependent on it for its political rights. This, as the history of this country has so often demonstrated, is necessary for the protection of its people.

In reaching these conclusions the court refers to what it held in United States *v.* Reese and United States *v.* Rogers, and says:

This is in substance the principle declared by the Supreme Court of the United States in Holden *v.* Joy.

This case was taken to the Supreme Court on appeal, where it was held that the Cherokee Nation was not sovereign in the sense that the United States, or a State, is sovereign, but is now, as heretofore, a dependent political community, subject to the paramount authority of the United States. The court said:

The fact that the Cherokee Nation holds these lands in fee simple under patents from the United States, is of no consequence in the present discussion, for the United States may exercise the right of eminent domain, even within the limits of the several States, for the purposes necessary to the execution of the powers granted to the General Government by the Constitution.

* * * * * * *

The lands in the Cherokee Territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the General Government, to take them for such objects as are germane to the execution of the powers granted to it; provided only that they are not taken without just compensation being made to the owner. (135 U. S., 641.)

There is no suggestion in the opinion as to the right of the United States to take these lands as a right of way on other ground than that of eminent domain, and no intimation of dissent from the position of the lower court as to the title and status of the Cherokees. There is, in fact, a positive and unqualified admission that "the Cherokee Nation holds these lands in fee simple under patents from the United States." The decree below dismissing the bill, because the relief asked

for was both legal and equitable, was reversed in order that the case might be tried *de novo*, and all the questions of law and fact that either party chose to raise be finally determined. The court expressed some doubt as to whether the reasons for their conclusion should be given, and say:

> But as the questions raised by the demurrer were elaborately examined by the court below, and were fully discussed at the bar, and as the plaintiff ought not to be led to suppose that a new bill in equity, based upon the alleged invalidity of the act of July 4, 1884, would avail any good purpose, we have concluded to state the grounds upon which we hold that Congress, in the passage of that act, has not violated any rights belonging to the plaintiff.

I do not claim that the passage first quoted amounts to an adjudication of the title to the Cherokee Outlet, but it is strongly indicative of what the opinion of the court would be if the question were before it, and it seems somewhat remarkable that in giving reasons for holding that no rights of the Cherokees had been violated, the entire court, including Mr. Justice Brewer, should have overlooked the fact that these lands actually belong to the United States, the right of the Cherokees being a mere easement, if such be the case.

In my report I remarked that in the fifth article of the treaty of 1835 it was stipulated that the lands ceded to the Cherokee Nation, including the 7,000,000 acres and the outlet, should never be included within the limits of any State or Territory without their consent.

> The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall in no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them.

You state that—

> A different construction may be placed upon this article. It is to the effect that the United States "hereby covenant and agree that the *lands* ceded to the Cherokee Nation in the foregoing article" shall not, without their consent, be included, etc. The *lands* here referred to are those mentioned in the third article, I think, beyond any question.

You quote from that article and say:

> Congress did not seem to consider the outlet as being of the "*ceded lands*," the plain intendment of that section being that the ceded lands under both treaties, and also the right to the outlet—a mere casement—shall be included in one patent. But even if the intention was to designate the outlet as ceded lands it by no means follows that a fee-simple title passes by the cession, and under the doctrine of the Cherokee Tobacco Case (*infra*) and the act of March 3, 1871 (*infra*), the Government has a right to exercise sovereignty over said lands as it pleases.

You then give the substance of the Cherokee Tobacco Case (11 Wall., 617).

I presume that by the reference to Congress the treaty-making power is intended. As we have already seen, the President, by whom, with the advice and consent of the Senate, treaties are made, solemnly assured the Cherokees, while seeking their approval of this treaty, that the country destined for their permanent residence, contained not less than 13,800,000 acres, while Secretary Cass informed the Senate Committee on Indian Affairs, with the approval of the President, that the whole country given and proposed to be given contained 13,800,000 acres. Is it not clear that the *lands* which were not to be included within the limits of any State or Territory without their consent, comprised their entire country of 13,800,000 acres?

This article was cited, not for the purpose of showing the nature of

the title, but to show that the lands of the Outlet could not be opened to settlement and included within the limits of a territory without the consent of the Cherokees, and this would be equally true whether their estate be in fee or merely an easement.

The sovereignty of the United States over the lands of the Outlet, and even over the 7,000,000-acre tract, together with the right of eminent domain, is freely admitted, but sovereignty extends over lands owned in fee simple as well as over lands belonging to the sovereign, and eminent domain is exercised wholly over lands *not* owned by the sovereign.

You refer to the Cherokee tobacco case, the Chinese exclusion case, and Cherokee Nation *v.* Southern Kansas Railway Company to show that treaty obligations are subject—

to the paramount right of the political department of the Government to repeal them by Congressional enactment whenever thought proper—a right incident to the sovereign power of the Government and essential to its existence.

The Cherokee tobacco case can hardly be considered as authority in view of the following declaration of the Supreme Court in United States *v.* Forty-three Gals. Whisky (108 U. S., 497).

The case of the Cherokee tobacco tax (11 Wall., 616) can not be treated as authority against the conclusion we have reached. The decision only disposed of that case, as three of the judges of the court did not sit in it, and two dissented from the judgment of the other four.

There can, however, be no question as to the existence of the right referred to in cases purely political. It is equally true that Congress has no constitutional power to settle or interfere with rights under treaties, except in such cases. (See Holden *v.* Joy, 17 Wall., 247, and authorities there cited.) This is distinctly recognized in the Chinese exclusion act (130 U. S., 609).

Possibly the stipulation in the treaty excluding the country of the Cherokees from the limits of any State or Territory without their consent is a purely political one, but it was doubtless one of the considerations that induced them to exchange their lands east of the Mississippi for those in the Indian Territory. But even if Congress has the constitutional power to abrogate this provision of the treaty, would not the exercise of the power be a violation of a solemn treaty stipulation?

The case of the Cherokee Nation *v.* The Southern Kansas Ry. Co. has already been referred to.

The case of the United States *v.* Kagama (118 U. S., 375), referred to in the foregoing case, involved the political status of Indians generally. The defendant was not a member of the tribe holding treaty relations.

A careful reading of the Chinese exclusion case and the Southern Kansas Railway Company case has strengthened my belief that whatever may be the title of the Cherokees to the lands in the "Outlet," they can not be opened to public settlement without the consent of the Cherokees.

The construction placed upon the rights of the Cherokees by the treaty-making power and by Congress fully agrees with that adopted by the courts.

By the sixteenth article of the treaty of July 19, 1866 (14 Stats., 804), it was agreed that—

The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled, the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes, to be held in common or by their members in severalty, as the United States may decide.

Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President. The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude, until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.

It will be observed that the Cherokee Nation agrees to sell the lands west of the ninety-sixth degree, an indefinite quantity of which were lands included in the "Outlet," not to the United States but to friendly Indians, payment to be made to the Cherokee Nation. This is certainly a recognition of the nation's *ownership* of these lands. Again, the nation is to *retain* jurisdiction and right of possession over unsold lands. Can it *retain* what it never possessed?

By a clause in the act of March 3, 1883 (22 Stats., 624), Congress appropriated the sum of $300,000 out of funds due under appraisement of Cherokee lands west of the Arkansas River, to be paid into the treasury of the Cherokee Nation:

Provided, That the Cherokee Nation, through its proper authorities, shall execute conveyances satisfactory to the Secretary of the Interior to the United States in trust only for the benefit of the Pawnees and other tribes now occupying said tract, as they respectively occupy the same before the payment of said sum of money.

Now, if the Cherokees had only an easement or right of passage in this tract, Congress required a party without interest to convey certain lands to the owner of the fee, in trust for a third party.

And yet by deeds accepted as satisfactory by the Secretary of the Interior, the Cherokees undertook to bargain, sell, remise, release, relinquish, and confirm unto the United States, in trust, etc., certain described tracts of land in the Outlet.

The seventeenth article of the treaty of 1866 is, in part, as follows:

The Cherokee Nation hereby cedes, in trust to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the treaty of 1835; and also that strip of land ceded to the nation by the fourth article of said treaty which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits of the said State.

The lands *ceded* were to be surveyed, and appraised by two disinterested persons, one to be designated by the Cherokee national council and one by the Secretary of the Interior, a third to be selected by the two appraisers in case of disagreement, the appraisement to be not less than an average of $1.25 per acre, exclusive of improvements.

The first of the tracts referred to is the 800,000-acre tract, or Cherokee neutral lands, and the second tract is a narrow strip of the Outlet lands, being that portion of the Outlet lying in Kansas, and sometimes called the Cherokee Strip. (The description, "Ceded to the nation by the fourth article," is erroneous, as no cession or transfer was made by the fourth article of the treaty of 1835.) (It is noticeable that the reference is to the treaty of 1835 and not that of 1828 or of 1833.)

The seventeenth article throws much light upon the status of the Outlet in two or three important particulars:

(1) The same words of transfer are used as to each of the two tracts, "The Cherokee Nation hereby *cedes*, in trust to the United States," the tract which was sold to the Cherokees, "and also that strip of the land ceded to the nation," etc. According to Bouvier the word "cede" means "to assign; to transfer; applied to the act by which one state or nation transfers territory to another." The highest words of transfer are used as to both tracts.

(2) The Cherokees consent that "said lands" (these words refer undoubtedly to both tracts; they certainly include the one last named) may be included in the limits and jurisdiction of the State of Kansas, thus showing conclusively that the treaty-making power understood the stipulation of the fifth article of the treaty of 1835 to include the lands of the Outlet.

(3) The lands in both tracts are to be surveyed, appraised, and sold in the same manner (except that the neutral lands *may* be sold in one body).

May 11, 1872, Congress passed an act "to carry out certain provisions of the Cherokee treaty of 1866, and for relief of settlers on the Cherokee lands in the State of Kansas." (17 Stats., 98.) The preamble of this act is as follows:

> Whereas in order that certain provisions of the treaty of July nineteenth, eighteen hundred and sixty-six, between the United States and the Cherokee Nation may be rendered clearer, and made more satisfactory to settlers upon the lands known as the "Cherokee Strip," in the State of Kansas, said settlers having moved thereon since the date of said treaty, and for the purpose of facilitating the sale of said lands.

The first section provides "that the strip of land lying west of the Neosho River, and included in the State of Kansas, *conveyed* to the Cherokee Nation of Indians by the United States, and *now belonging to said nation*, shall be surveyed under the direction of the Commissioner of the General Land Office." (The italics are mine.)

This is a declaration by Congress that the land in the outlet was "conveyed to the Cherokee Nation of Indians by the United States," and that the portion thereof lying in the State of Kansas then belonging to said nation, notwithstanding the fact that the same had been ceded to the United States in trust by the seventeenth article of the treaty of 1866. It also provides for offering the lands for sale, giving settlers the right to enter and purchase lands occupied by them.

The third section provides that any Cherokee citizen, who had rights under the Cherokee laws to any portion of said lands, and whose titles were valid at the date of the treaty of 1866, shall receive the proceeds of the sale of such identical land, not exceeding 160 acres, instead of their being invested as provided in section four. This recognizes the right of a Cherokee citizen, prior to the treaty of 1866, to settle upon lands in the "outlet" and acquire title thereto under Cherokee laws.

The fifth section provides that the sale of the lands under the act shall not take place until the provisions of the act shall be accepted by the Cherokee national council, or by a delegation duly authorized.

Can these provisions of the treaty of 1866 and the two acts referred to be reconciled with the theory that the United States never parted with the fee to the outlet lands, and that the Cherokees never had more than an easement which secured to them a mere right to use and occupy it for specified purposes?

It has been held by the Department that the outlet lands can be disposed of only as provided in the treaty of 1866. In a letter to the President dated February 28, 1882, Secretary Kirkwood says:

> The Cherokees, by that treaty, ceded certain lands to the United States for a specific purpose, to wit, the settlement thereon of other tribes of friendly Indians, and the United States took the lands for that purpose and can use them for that purpose only. * * * (House Ex. Doc. No. 89, Forty-seventh Congress, first session.

In a letter to the president *pro tempore* of the Senate, dated January 3, 1885, Secretary Teller said:

> The Cherokees have a fee-simple title to their lands, and they do not recognize the right of the Department to interfere in the management of their affairs with reference thereto. (Senate Ex. Doc. No. 17, Forty-eighth Congress, second session.)

The subject under discussion was the leasing of the Outlet lands.

But as regards the right of Congress to open these lands to settlement without the consent of the Cherokees, it seems to me that it is wholly immaterial whether they hold a complete estate in fee to the lands of the Outlet or only an easement or right of passage over. In either case the guarantee is "forever" and "perpetual," and they can no more, without their consent, be divested of the latter than of the former.

Again, Congress in the act of March 2, 1889 (25 Stats., 980) authorized the appointment of a Commission to negotiate with the Cherokees for the cession of all their rights in these lands upon the same terms as to payment as was provided for in the agreement with the Creeks.

Having attempted to acquire the rights of the Cherokees, whatever they may be, Congress would seem to be estopped, after failure of negotiations, from proceeding on the theory that negotiations are unnecessary.

You regret that I should have thought proper to charge that those who differ with me in judgment "are disregarding solemn obligations and violating plighted faith," instead of confining myself to an expression of my views on the law and facts as requested. The language used by me is as follows:

> But in my opinion this Government can not afford to disregard its solemn obligations and violate its faith in order to accomplish that purpose.

I made no charges against anyone, but simply expressed my own opinion as to the method proposed by the bill. I question the motives of no one in this matter, and have no reason to suppose that any of the advocates of the bill are actuated by other than honest motives, or that they do not conscientiously believe in the absolute equity of the measures proposed.

I have endeavored to state as clearly as possible the reasons which lead me to oppose any measure looking to the acquisition of these lands without the consent of the Cherokees, and to show that my report of February 4, 1891, does not contain "many errors of law and fact." I regret that I am compelled to differ with you in this matter, but I am unable to reach any other conclusion than that expressed in my former report.

In concluding my report I expressed the belief that the differences between the Cherokees and the Cherokee Commission might be reconciled and the Unites States acquire, by consent of the Indians, a clear title to the lands without having recourse to the proposed legislation.

As the Commission have succeded in reaching an agreement with Commissioners representing the Cherokee Nation, which agreement has been ratified by the Cherokee National Council, and is now before this office for consideration, the result has vindicated my judgment in this respect.

In connection with this subject it seems proper that I should refer to the decision of Judge Green in the Logan district court of the Territory of Oklahoma, in the case of J. H. Jordan *et al. v.* Henry J. Goldman. In this case the complainants, claiming to be Cherokee citizens, and as such entitled to farm lands and to operate a stone quarry on the Cherokee Outlet, filed their bill for an injunction against the defendant, who as an Army officer, was, under the proclamation of the President, dated February 17, 1890, and certain orders of the War Department, ejecting cattle and persons from the Cherokee Outlet, and was about to eject the complainants with their property and close up the quarry. Judge

Green quotes from several treaties with the Cherokee Nation, the patent conveying the lands of the outlet to said Nation, and from the cases of Holden *v.* Joy, United States *v.* Reese, United States *v.* Rogers, and United States *v.* Soule, and concludes that the Cherokee Outlet was ceded and granted by the United States and accepted by the Cherokee Nation for the purpose of, and to be used as, an outlet only, and was so understood by both parties to the treaties and patent. He says:

It is contended on behalf of the complainants and alleged in their bill of complaint that the Cherokee Nation is the owner of the Cherokee Outlet in fee simple, and, in behalf of the defendant, that their only interest is a mere *easement* and that the fee of the lands is in the United States. It is clear, however, upon principle and authority, that neither one of these positions is tenable, and that the estate of the Cherokee Nation is a base, qualified, or determinable fee, and that, too, whether we reject or retain the condition in the patent, that the lands shall revert to the United States, if the Cherokee Nation shall abandon the same.

He discusses the character of this kind of an estate, and holds that as the Cherokee Nation could not lawfully and by right use any part of the Cherokee Outlet for the purpose of quarrying, selling, and shipping the stone found thereon, it could not by license authorize the complainants in the suit to operate a stone quarry and to sell and ship the stone. He then refers to article 16 of the treaty of 1886 and holds that the rights of the Cherokee Nation in the use of the Outlet are not enlarged thereby. He further holds as follows:

If the Cherokee Nation has ceased to use the Outlet *as an outlet*, the cesser of the use had terminated their estate, and the lands have *reverted* to the United States, but whether there has been a *cesser* of the use is rather a political than a judicial question, which should be settled by Congress and the chief executive of the nation, and if the lands have been abandoned *as an outlet*, and subjected to other uses by the Cherokee Nation, or with their consent and by their authority, their estate has terminated and they have reverted to the United States.

This decision substantially maintains that the estate of the Outlet is in the Cherokee Nation, but that such estate is less than a fee simple, being a fee with the condition subsequent attached by operation of law. Accepting his position as correct, the grantor could no more divest the grantee of his title in the Outlet than it could if he held fee simple title, except upon the breach of the condition. He, however, introduces a new element into the discussion by suggesting that if the Cherokee Nation has ceased to use the Outlet as an outlet, such cesser has terminated their estate, and the lands have reverted to the United States, which question, he says, is rather a political than a judicial one.

In the course of his opinion, Judge Green says:

And as to the *seven million acres*, the Supreme Court of the United States in the case of The Cherokee Nation *v.* Kansas Railway Co. (135 U. S., 656), concedes that the Cherokee Nation holds the same in fee simple. The Court there says: "The fact that the Cherokee Nation holds these lands, in fee simple, under patents from the United States, is of no consequence in the present discussion."

He quotes other cases, and says:

What was said in these cases, however, was said with reference to the estate of the Cherokee Nation in the permanent home lands, being the 7,000,000 acres, and the 800,000 acres, and did not refer to the estate of the Cherokee Nation in the Cherokee Outlet.

In this statement Judge Green has fallen into an error which is of great significance. He admits that the Supreme Court has conceded that the Cherokee Nation holds the "home" in fee simple, and proceeds to draw a distinction as to the "outlet." The conclusion seems to be almost irresistible that if he had known that the utterance of the Supreme Court which he quotes had exclusive reference to the "outlet" (as is the fact), he would have been compelled to decide that the Cherokee Nation

holds the "outlet" in fee simple. Judge Green's law is therefore based upon an "error of fact" which destroys the force of his reasoning.

I have also read the opinion of the Kingfisher district court of Oklahoma in the case of Jacob Guthrie *v.* Capt. William P. Hall, which involves substantially the same questions as the preceding case. An oral opinion was rendered by Judge Seay in which he holds that the title to the perpetual outlet west "is a mere easement, a use, subject to forfeiture in case the Cherokee Nation becomes extinct or abandons the outlet." He then holds that the nation has abandoned the outlet by the voluntary sale and conveyance of some 2,000,000 acres to the Osage and other Indians. This opinion and that of Judge Green are directly in conflict as to the nature of the estate of the Cherokee Nation in the outlet. Judge Green also holds that the fact of the abandonment is rather a political than a judicial question, while Judge Seay decides it. So far as I am aware, the question of the abandonment of the outlet by the Cherokees has never before been raised. The fact that the treaty of 1866 gave to the United States the right to settle friendly Indians west of the ninety-sixth degree, and the further fact that the United States has settled a large number of Indians on what may possibly be the eastern part of the "outlet," can not, I think, be held to constitute an abandonment of the unoccupied lands of the "outlet," for the treaty of 1866 distinctly continues the right of posession and jurisdiction over all the lands west of the ninety-sixth degree until sold and occupied.

It was manifestly not the intention of this provision of the treaty to divest the Cherokees of any rights in this country which they before possessed, other than to secure to the United States the right to settle friendly Indians thereon, nor did it contemplate that the United States could settle Indians on a narrow strip on the eastern end of these lands and thereby forfeit the rights of the Cherokees in all the remaining lands. The "outlet" is some ten townships in width, or sixty sections. By locating sixty friendly Indians on contiguous forties, the United States, under the opinion of Judge Seay, who appears to assume that all of the lands west of the ninety-sixth degree are a part of the "outlet," could have caused an "abandonment" of the entire "outlet," except the 9,600 acres required for these sixty Indians, which is hardly supposable. Besides, what becomes of the treaty stipulations that the Cherokee Nation shall retain jurisdiction and right of possession over all of said country until sold and occupied, after which their jurisdiction and right of possession to terminate forever *as to each of said districts thus sold and occupied.*

These opinions of these lower courts seem to me to be so at variance with judicial, legislative, and executive action and expression, as well as with each other, that they can hardly be regarded as authoritative until confirmed by some higher court.

The courts have laid down rules by which we are to be governed in construing Indian treaties. In the case of Worcester *v.* Georgia (6 Peters, 581), Mr. Justice McLean said:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

This is affirmed in 5 Wall., 737. Again, in Choctaw Nation *v.* United States (119 U. S., 1), the language is quoted, and the court adds:

> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and

control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate ,recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws

In United States *v.* Payne, (8 Fed Rep., 883), the court said as to the treaty then under consideration:

In construing the treaty we have a right to take into consideration the situation of the parties to it at the time it was made, the property which is the subject-matter of the treaty, and the intention and purposes of the parties in making the treaty. To get at this intention we have a right to consider the construction the parties to the treaty, and who were to be effected by it, have given it, and what has been their action under it.

I think I have shown that the parties to the treaty of 1835 understood that the Cherokees were to have a country of 13,800,000 acres, for which they were to receive a patent in fee, and were to hold it all (forever) as the white man holds his land.

In closing, allow me to indicate the conclusions that I believe are warranted by this presentation of the law and the facts in this case:

First. The question of the character of the title to what is known as the "Cherokee Outlet," which embraces over 6,000,000 acres of land, is one of vast importance, not only so far as the rights of the Cherokees and their moneyed interests are concerned, but also as involving the faith and honor of the National Government.

Second. This office appreciates very fully the desirability of extinguishing the Indian title to the land in question and its restoration to the public domain in order that it may become a part of the Territory and future State of Oklahoma, to whose progress and prosperity it is so essential, and it is only desirous that the rights of the Cherokees in the matter shall be fully protected and the national honor conserved.

Third. In determining the question of ownership to the land under consideration, the terms used in the treaties and patent, as well as in contemporaneous official utterances, are to be construed by us in the meaning which was attached at the time by the Cherokee people.

Fourth. The "outlet" referred to by J. C. Calhoun, then Secretary of War, was not the "outlet" now under consideration, and consequently his statement that the Cherokees acquired no right to the soil, but merely an outlet, has little or no relevancy in this discussion.

Fifth. The statement of the Secretary is referred to in the preamble only, does not enter into the body of the treaty, and consequently forms no essential part of the grant.

Sixth. The act of May 28, 1830, authorized the President of the United States in making exchanges of lands with Indian tribes to assure the tribe or nation with which the exchange was to be made that the United States would forever secure and guarantee to them and their heirs and successors the country so exchanged with them, and, if they preferred it, that the United States would cause a patent or grant to be made and executed for the same.

Seventh. The lands of the Cherokee Nation, both the "home" and the "outlet," were conveyed to that nation in exchange for other lands.

Eighth. We must look to the treaty of 1835, made with the Eastern Cherokees to induce them to remove to the Western lands, rather than to the treaties of 1828 and 1833, for the nature and character of the grant.

Ninth. In the negotiations attending the conclusions of this treaty, the Cherokees were solemnly assured by the President, who had the right to make such assurance under the act of 1830, that 13,000,000 acres were destined for the permanent residence of the Eastern and Western Cherokees, and that they would hold it by the same title as the white man holds his lands.

Tenth. The treaty of 1835 stipulated for the survey of the "home" and the "outlet" in one tract. Under this survey the boundaries between the "home" and the "outlet" could not be established, and as a result all distinction between the "home" and the "outlet" was thereafter obliterated.

Eleventh. The sixteenth article of the treaty of 1866 recognized the title of the Cherokees to all the lands in the Cherokee country. It granted the United States the right to settle friendly Indians in any part, not of the "outlet," but of the Cherokee country west of the ninety-sixth degree of longitude, which description must have included some 2,000,000 acres of the Cherokee "home."

Twelfth. The seventeenth article of that treaty recognized the ownership of the Cherokee Nation in that part of the "outlet" lying in the State of Kansas; under it the Cherokee Nation ceded those lands to the United States.

Thirteenth. The courts of the United States, including the Supreme Court, have held or admitted that the Cherokee Nation holds these lands in fee simple under patents from the United States.

Fourteenth. Congress has repeatedly recognized the fact that all the title to the "outlet" is vested in the Cherokee Nation.

Fifteenth. This fact has also been recognized by the Executive Departments.

Sixteenth. If it be admitted that the Cherokee Nation has only an easement or right of way over this land, it can no more be deprived of such easement or right, lawfully, without its consent, than if it held a fee-simple estate.

Seventeenth. Congress having recognized the necessity of negotiating with the Cherokees for the relinquishment of their right, title, and interest in and to these lands, is now estopped from asserting that the Cherokees have no such right, title, or interest as to render negotiations necessary.

Eighteenth. The right accorded the United States by the treaty of 1866 to settle friendly Indians on lands west of the ninety-sixth degree can not work an abandonment of or an easement in these lands, because the Cherokee Nation is to retain the right of possession and jurisdiction over all of said country until sold and occupied (by friendly Indians), and their jurisdiction and right of possession is to terminate only as to each of the districts thus sold and occupied.

Nineteenth. While it is admitted that these lands are subject to the right of eminent domain, such right extends only to the taking of lands for "public use" subject to just compensation. The opening of these lands to private entry and settlement is not such a public use.

Twentieth. If the "outlet" lands could be taken without the consent of the Cherokees, it would be necessary to ascertain by actual survey the western boundary of the 7,000,000 acres or "home," in order that none of these lands in which the Cherokees confessedly have all the estate, may be opened to settlement.

Twenty-first. To make any other disposition of the "outlet" lands than that contemplated by the treaty of 1866, without the consent of the Cherokees, would, if the foregoing conclusions are correct, be a vio-

lation of treaty stipulations and of the solemn pledges given by President Jackson.

Twenty-second. Congress at its last session extended the services of the Cherokee Commission, which has continued the negotiations with the Cherokee people.

These negotiations have been successful and the agreement concluded has been ratified by the Cherokee Council, and now only awaits favorable action by Congress.

Very respectfully, your obedient servant,

T. J. MORGAN,
Commissioner.

The SECRETARY OF THE INTERIOR.

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